We are not attorneys. Relying on this website for legal advice is like relying on your mother-in-law for an accurate analysis of the latest Taylor Swift break-up song. *Don't do it.* (Unless your mother-in-law works for Swift's music company or knows her personally. In which case, please have Taylor call us.)

Having said that, let us now discuss the matter of *Kenney Orthopedic, LLC v. The United States* . Kenney's suit at the U.S. Court of Federal Claims alleged that the U.S. Government – specifically, the Veterans Administration – breached a settlement agreement the parties had executed as part of settling another dispute.

Let's recap: the parties settled one dispute and memorialized the terms of that settlement in written document, which led to the parties having another dispute when the terms of the settlement were (allegedly) not properly fulfilled. That's two bites of the same apple. And as we will learn, Kenney really had three bites, because its CoFC suit was filed twice.

Hmm. Sounds disputatious, not to mention litigious. We're going to go *way* out on a limb here, but we bet lawyers were involved.

Here's **a link** to the second decision on Kenney's third suit.

The initial dispute started in August, 2006, when Kenney received a contract from the VA "to supply prosthetic and orthotic devices and services to the VA Medical Center ('VAMC') in Lexington, Kentucky.

Before we go any further, let's all remember that the VA has been in recent news regarding standards of care and administrative "challenges" associated with managing patient care. The "patients" at issue are veterans of military service. On this day (if not every day) let us remember the service and sacrifice of our veterans. In addition, let's acknowledge the VA staff and administrators who struggle with a difficult system to provide care to wounded warriors. And let's also acknowledge the VA contractors who support those struggles and, by doing so, support those who served and sacrificed.

Anyway, the Kenney and the VA disagreed as to whether or not Kenney was fulfilling the terms of its contract. Events transpired and Kenney found itself terminated for default (T4D) because of alleged non-performance and a failure to respond to a "cure notice". Fourteen months had passed since contract award.

Fourteen months after that (January 2, 2008) Kenney filed suit at the U.S. Court of Federal Claims, "alleging breach of contract and three tort claims." Seven months later (August, 2008), the suit was dismissed without prejudice because "Plaintiffs did not satisfy the jurisdictional prerequisite of the Contract Disputes Act, 41 U.S.C. § 605(a), that Plaintiffs submit a certified claim to the Contracting Officer ('CO') before filing suit in the United States Court of Federal Claims." (We note the tort claims were dismissed for lack of jurisdiction.)

A couple of quick "lessons learned" so far:

1.

If you receive a "cure notice" from your government customer, that is an important signal that things are *really* not going well with respect to either your performance or your customer relationship. You really *should not* ignore a "cure notice" and, if you should happen to do so, you should not be surprised when your contract is terminated for default. Which is emphatically **not a good thing** .

1.

If you are going to all the trouble of hiring an attorney and filing a suit against the Federal government in a Federal court, remember that you must first file a certified claim with your cognizant CO and give the CO a chance to resolve it. We understand that you feel it is unlikely you will receive a fair and impartial decision after all the acrimony and finger-pointing and name-calling that has taken you to the point where you feel you have to file a lawsuit, but you still have to do it anyway.

Subsequently, Kenney filed its certified claim with the CO and did not receive a satisfactory resolution at that level, so a few months later (January 16, 2009) the company was back at the Court of Federal Claims, this time alleging breach of contract and for breach of the implied covenant of good faith and fair dealing." Judge Braden wrote—

On August 17, 2009, the court issued a Memorandum Opinion and Order determining that: Plaintiffs' claims were not barred by the statute of limitations; the court had jurisdiction over Plaintiffs' breach of the implied covenant of good faith and fair dealing claim; and the January 16, 2009 Complaint stated a claim for which relief could be granted.

It was at that point the parties "engaged in negotiations resulting in a Settlement Agreement." That written agreement called for Kenney to dismiss its claims in return for a payment of $200,000. In addition, the Settlement Agreement called for the VA to take the following actions—

(1) add Plaintiffs to 'its list of contract vendors for prosthetics at the Lexington VA Medical Center' within 10 days of execution of the Settlement Agreement or on June 1, 2011, whichever was later; (2) treat Plaintiffs 'in the same fashion as other similarly situated offerors in the solicitation for any future contract;' and (3) 'designate a Contracting Officers' [sic] Technical Representative (COTR), other than [Ms.] Peggy Allawat, [as the VA contact] for future interaction with Plaintiff.'

Another lesson learned: note that serious negotiations took place only after the court agreed to hear the case. This comports with our recent experiences, wherein Contracting Officers too

often do not really exert themselves to resolve disputes (despite what the FAR requires) and, instead, leave it to the attorneys. Once “adult supervision” enters the picture, serious negotiations take place and many disputes are quickly resolved. Apparently, COs are not held accountable for failing to comply with the FAR in this area.

It took the parties another two years but, by May, 2011 the Settlement Agreement had been executed and the suit was dismissed with prejudice on June 3, 2011.

And then Kenney went back to the court for a third time, now alleging that the VA violated the terms of the agreement.

Kenney alleged three breaches:

1.

It took the VA too long to add Kenney to its list of VAMC vendors.

2.

Kenney was treated differently than other vendors.

3.

The former COTR, Ms. Allawat, continued to hinder Kenney’s business prospects at the VAMC.

Judge Braden was not persuaded by Kenney’s arguments. She found that the VA had added Kenney to its vendor list within 10 days of the Settlement Agreement *being signed by both parties* . Although Kenney had argued that the clock started running on May 17, 2011 – when Kenney executed the agreement – Judge Braden ruled that the clock started running on May 31, 2011 – when the Government executed the agreement. She wrote, “As a matter of law … a contract is not executed until both parties manifest assent by signing the document.” Since Kenney had been

added to the vendor list on June 9, the VA had met the requirements of the Agreement.

Further, Judge Braden found that a subsequent VA solicitation and award of a Blanket Purchase Agreement (BPA) to Kenney evidenced that it had been treated equally. She noted that Kenney offered no evidence of disparate treatment.

Finally, Judge Braden found that, indeed, the VA had given Kenney another Contracting Officer's Technical Representative (COTR), replacing Ms. Allawat. Even if (as alleged) Ms. Allawat continued to make comments regarding Kenney to other members of the VAMC staff, such behavior was not covered by the Settlement Agreement. She wrote—

The VA assigned Mr. Hurt as Kenney's COTR. … And, after the BPA award, Mr. Hurt became Kenney's COTR. … Kenney has offered no evidence that Ms. Allawat ever 'interacted' with it. The Settlement Agreement does not prohibit, as Plaintiffs contend, Ms. Allawat otherwise from 'interacting' with VA staff. … Plaintiffs have not offered evidence that the VA failed to 'designate a [COTR], other than [Ms.] Allawat, for future interaction with Plaintiff[s].' This is all the Settlement Agreement required. The integration clause therein precludes the court from adding additional requirements

Judge Braden granted the Government's Motion for Summary Judgment and Kenney lost its third suit.

Settlement Agreements are tricky things. It is important for the parties to think about what they want to get out of a negotiated settlement, and to ensure the terms of the agreement reflect those intentions. In the euphoria of nearing an agreement and resolving a long-standing dispute, it is all too easy to execute an agreement that will not lead to the desired end-state. The closer the parties get to the final language, the more pains must be taken to ensure that language will, indeed, resolve the dispute in the manner the parties intend. This is the final lesson we learned from today's story about Kenney Orthopedic, LLC, and its three trips to the U.S. Court of Federal Claims.

Happy Veterans' Day.